

FILED  
03-14-2019  
CIRCUIT COURT  
DANE COUNTY, WI  
2019CV000084

STATE OF WISCONSIN

CIRCUIT COURT  
Branch 9

DANE COUNTY

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THE LEAGUE OF WOMEN VOTERS  
OF WISCONSIN, et al.,

Plaintiffs,

v.

Case No. 19-CV-84  
Case Code 30701 & 30704

DEAN KNUDSON, et al.,

Defendants,

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**WISCONSIN ELECTIONS COMMISSION DEFENDANTS'  
BRIEF IN REPLY TO PLAINTIFFS' BRIEF IN OPPOSITION  
TO DEFENDANTS' MOTION TO DISMISS**

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Plaintiffs cite *Berlowitz v. Roach*, 252 Wis. 61, 30 N.W.2d 256 (1947), for the proposition that a lawsuit is properly brought against an enforcing official to prevent an unlawful act. Plaintiffs also state that Wis. Stat. § 5.05(t) does not apply to the unpublished decisions of a circuit court and that the 2-month implementation period set forth in that statute would cause them irreparable harm. Finally, the plaintiffs argue that their requested relief is not moot because most of the elections-related provisions of Act 369 have not been enjoined and the federal injunction applicable to others may be reversed.

The *Berlowitz* case did not involve the constitutionality of a state statute, but rather the enforcement authority of a state official named as a defendant in the case. That official, the state treasurer, took the position that a particular statute, the legality of which was not in dispute, authorized him to enforce a new liquor tax on products sold by the plaintiff. In response to the

defendants' argument that a declaratory judgment action could not be maintained, the court found that the claim "was not an action against the state," but rather "an action against the enforcing officer to prevent him from doing that which it is claimed he has no legal right to do..." 252 Wis. at 64.

This case is the opposite of *Berlowitz*, as it involves the constitutionality of state statutes, as to which the Elections Commission defendants take no position. Their authority is not in question, nor is there any suggestion that they will not abide by a decision of this court. They are not proper parties to this action.<sup>1</sup>

As to § 5.05(t), it was cited in the initial brief of these defendants solely as an example of the limitations imposed on the Commission's authority to act. While the statute itself provides a time frame for the issuance of guidance following the "publication" of a binding decision, it by no means implies that the Commission need only abide by published judicial decisions or that any decision impacting its statutory duties is effectively stayed for two months.

Finally, Sections 91-95 of Act 369 primarily concern the issuance of state identification cards. The Elections Commission does not issue such cards. The provisions of Act 369 that relate to the administration of elections, Sections 1k and 92, are not enforceable until and unless Judge Peterson's injunction is overturned. As to those provisions, there is no controversy ripe for judicial determination.

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<sup>1</sup> It is noteworthy that the plaintiffs have not brought suit against all parties impacted by the challenged laws, including the 82 individuals whose appointments were confirmed. Must those individuals be joined as defendants lest they not be bound by any injunctive relief ordered by the court, including any among those 82 who were appointed to the bench?

### CONCLUSION

For the reasons stated in their brief in chief and herein, it is respectfully requested that the Election Commission defendants be dismissed from this action.

Dated: 3/14/19

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